

No. **76-408** **SEP 17 1976**

Supreme Court, U. S.

FILED

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT MAXWELL FENLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. _____

ROBERT MAXWELL FENLON,

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Robert Maxwell Fenlon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered June 7, 1976.

OPINION BELOW

On June 7, 1976, the Court of Appeals entered its opinion affirming the conviction of petitioner for willfully and knowingly encouraging and inducing, and attempting to encourage and induce, the entry into the United States of an alien, who was not lawfully entitled to enter and reside within the United States in violation of 8 U.S.C., Section 1324(a) (4). Petition for rehearing was denied on August 20, 1976. A copy of the opinion, which has not been officially reported, is attached as Appendix A. A copy of the Order denying petition for rehearing is attached as Appendix B.

JURISDICTION

On June 7, 1976, the Court of Appeals entered judgment affirming the conviction of petitioner for willfully and

knowingly encouraging and inducing, and attempting to encourage and induce, the entry into the United States of an alien who was not lawfully entitled to enter and reside within the United States. (App. A) Petition for rehearing was denied on August 20, 1976. (App. B) Jurisdiction to review the judgment of the Court of Appeals is conferred upon this court by Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court adequately complied with Rule 11, Fed. R. Crim. P. at the time petitioner's plea of guilty was entered.

2. Whether the District Court abused its discretion in denying petitioner's motion to withdraw his plea of guilty.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be ... deprived of life, liberty or property without due process of law;

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him;

STATUTORY PROVISIONS INVOLVED

Title 8, United States Code, Section 1324(a) (4):

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of - any alien ... not duly admitted by an Immigration Officer or not lawfully entitled to enter or reside within the United States ... ; shall be guilty of a felony Rule 11, Federal Rules of Criminal Procedure.

(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) The nature of the charge to which the plea is offered, ...

STATEMENT OF THE CASE

On September 19, 1975, petitioner entered a plea of guilty to Count V of an indictment containing nineteen counts. (C.R.71)^{1/} (R.T.I)^{2/} Count V alleged a violation of Title 8, U.S.C., Section 1324(a) (4). (C.R.6)^{3/}

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- ^{1/} "C.R." refers to the Clerk's Record on appeal.
- ^{2/} "R.T.I" refers to the Reporter's Transcript of the proceedings on September 19, 1975, when petitioner entered his plea of guilty.
- ^{3/} Count V of the indictment reads as follows:

On or about July 31, 1975, defendant, Robert Maxwell Fenlon, willfully and knowingly encouraged and

On November 17, 1975, petitioner filed a motion to withdraw the plea of guilty entered on September 19, 1975.

(R.T.II)^{4/} On December 3, 1975, petitioner's motion to withdraw his plea of guilty was heard before the Honorable Gordon Thompson, Jr., District Court Judge.

(R.T.III) ^{5/}

induced, and attempted to encourage and induce the entry into the United States at San Ysidro, California, within the Southern District of California, from Mexico, of Blanca Estela Ramos-Farrel, an alien who was not lawfully entitled to enter and reside within the United States and thereafter, said defendant was first found in the Southern District of California in violation of Title 8, United States Code, Section 1324(a) (4).

^{4/} "R.T.II" refers to the Reporter's Transcript of the proceedings on November 17, 1975, when petitioner filed his motion to withdraw the plea of guilty entered.

^{5/} "R.T.III" refers to the Reporter's Transcript of the proceedings on December 3, 1975.

Petitioner's motion to withdraw his plea of guilty was based upon several grounds, including the following:

1. That petitioner did not fully understand the nature of the charge against him at the time his plea of guilty was entered; (C.R.58) and

2. That the petitioner's plea of guilty was not voluntary, and was given under a misapprehension because of misrepresentations made to him by his prior counsel of record. (C.R.25)

After hearing, the Court found that the petitioner made his plea (of guilty) freely and voluntarily and with a full and clear understanding of the nature and consequences of his pleading guilty; (R.T.III 71) that the petitioner was properly advised by his counsel of record; (R.T.III 71) and that there was "no question but that the defendant knew exactly what he was doing." (R.T.III 71) The District

Court denied petitioner's motion to withdraw the plea of guilty (R.T.III 71-72) and on December 8, 1975, petitioner filed a Notice of Appeal. (C.T.68)

The United States Court of Appeals for the Ninth Circuit, by Order dated June 7, 1976, (App. A) affirmed the judgment of conviction, found adequate compliance with Rule 11, Fed. R. Crim. P., and found no abuse of discretion in refusing to permit the withdrawal of the plea of guilty.

The petitioner entered a plea of guilty to Count V of a nineteen count indictment which was filed against petitioner on August 6, 1975. (C.T. 1-20) Count one charged the petitioner with conspiracy to violate Title 8, U.S.C., Section 1324. (C.T.1) Counts two through seven charged petitioner with violation of 8 U.S.C., Section 1324(a) (4). (C.T.3-8) Counts eight through thirteen charged petitioner

with violation of 8 U.S.C., Section 1324(a) (3). (C.T.9-14) Counts fourteen through nineteen charged defendant with violation of 8 U.S.C., Section 1324(a) (2). (C.T. 15-20)

Count V of the indictment alleged that the defendant " ... willfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States ... of ... an alien, who was not lawfully entitled to enter and reside within the United States, ... (C.T. 6)

The Reporter's Transcript of the proceedings on September 19, 1975, R.T.I) at which time the defendant's guilty plea was accepted by the court establishes the following:

1) At no time did the court personally address the defendant as to his understanding of the essential elements of the charge to which he pled guilty;

2) The court inquired generally of the defendant on one occasion only as to whether he understood the nature of the charge to which he was pleading guilty; (R.T.I 6)

3) During the proceedings on September 19, 1975, the court, or the court clerk, gave four different explanations of the nature of the charge to which the defendant was pleading guilty, to wit:

a) "Robert Maxwell Fenlon, do you now withdraw your former plea of not guilty to Count five of the indictment which charges you with smuggling an alien"; (R.T.I 3) (It was following this explanation that the defendant indicated he understood the nature of the charge.) (R.T.I 6)

b) "Robert Maxwell Fenlon, do you now withdraw your former plea of not guilty to Count five of the indictment which charges you with introducing the illegal entry of aliens?" (R.T.I 15)

c) "Count five of the indictment says that you knowingly encouraged and induced or attempted to encourage and induce Blanca Estela Ramos-Farrel, an alien, to enter and reside within this country." (R.T.I 20)

d) "You knew it was illegal to induce or to have anything to do with the bringing in of aliens into this country from Mexico, didn't you?" (R.T.I 21)

On the only occasion that the Court personally inquired of the defendant as to his understanding of the nature of the charge (R.T.I 6), the only explanation by the Court was that "count five of the indictment ... charges you with smuggling an alien."

The petitioner, at the hearing on December 3, 1975, testified that his prior counsel of record, E. Daniel DeAnda, did not fully explain the elements of the offense to petitioner, and further testified

that had he known the nature of the acts, and the degree of intent which are necessary elements of the offense, petitioner would not have pled guilty to the offense.

(C.T. 61-62; R.T.III 4)

The petitioner further testified that Mr. DeAnda did not advise him as to what acts would have to be proved in order to sustain a finding of guilty to Count V, but that Mr. DeAnda only read Count V to him. (R.T.III 37)

Mr. DeAnda testified he had advised the petitioner fully as to the specific elements which were required to sustain a finding of guilty to Count V. (R.T.III 25) Mr. DeAnda stated he had advised petitioner as follows:

"I talked to Mr. Fenlon and read this section to him, (Title 8, U.S.C., Section 1324(a) (4)) and told him that if the court and the jury believed that he knew--that he intended --that he had knowledge of encouraging and inducing the aliens of his-- tried to help them enter this country,

he would be found guilty of this particular charge."
(R.T.III 26)

Mr. DeAnda further informed the petitioner that any help petitioner might give would be sufficient to make him guilty of that charge. (R.T.III 26)

Petitioner further testified at the hearing on December 3, 1975, that his plea was involuntary in that he did not knowingly and intelligently waive his right to confront and cross-examine the witnesses against him. (C.R. 35, R.T.III 5) The petitioner testified at length concerning the representations made to him by Mr. DeAnda prior to the entry of petitioner's guilty plea, and the fact that Mr. DeAnda informed petitioner that Mr. DeAnda had cross-examined the witnesses under oath on September 17, 1975, two days prior to petitioner's plea of guilty. (C.R.31-36; R.T. III 5) Rachel Hurtado testified that she was present on September 18, 1975, when Mr.

DeAnda informed petitioner that Mr. DeAnda had cross-examined, under oath, the material witnesses, on September 17, 1975, and that the material witnesses had testified against the petitioner. (C.R. 26-27; R.T. III 5)

Mr. DeAnda admitted having a conference with the petitioner on September 18, 1975, but denied telling petitioner that he had cross-examined the witnesses under oath. (R.T.III 31) Mr. DeAnda did testify that: "I think Mr. Fenlon misunderstood the word 'cross-examination' in his mind, even today, as far as in comparison to questioning." (R.T.III 32)

Mr. DeAnda stated to the District Court on at least two occasions that the defendant had no meritorious defense to Count V of the indictment. (R.T.III 7, 19) Mr. DeAnda testified that "we just picked one count at random" in deciding what count to which the defendant would enter a plea.

Mr. DeAnda further stated that he advised the petitioner to plead guilty to Count V because: "I think that's the Count Mr. Hoffman offered us". (R.T.III 30)

Mr. DeAnda was specifically asked if he considered with Mr. Fenlon whether the petitioner had a meritorious defense to that particular Count. Mr. DeAnda replied: "Well, I think that was part of the deal. If he (petitioner) pled guilty to this charge, he would drop all the other 18 counts." Mr. DeAnda evaded further inquiry into whether he discussed a meritorious defense as to Count V with the petitioner by stating:

"My only answer to that question would be that the part of the plea bargain that was made with Mr. Hoffman was if Mr. Fenlon pled guilty to that particular Count, the other 18 counts would be dropped." (R.T.III 30)

The District Court denied petitioner's motion to withdraw his plea of guilty on December 3, 1976, and on December 4, 1976,

petitioner was sentenced to the custody of the Attorney General for two years. On June 7, 1976, the Ninth Circuit affirmed the conviction of petitioner (App. A) and on August 20, 1976 denied petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. The evidence is insufficient to support the finding of the Ninth Circuit that there was adequate compliance with Rule 11, Fed. R. Crim. P., by the District Court at the time defendant's plea was entered.

Rule 11, Fed. R. Crim. P., requires that the District Judge must address the defendant personally in open court and inform him of, and determine that he understands, the nature of the charge to which the plea is offered.

The record of the Rule 11 inquiry (R.T. I, supra pp. 9-11) as it relates

to the Court's duty to personally inform a defendant of the nature of the charge, and to personally determine that the defendant understands the nature of the charge conclusively establishes that:

A. The Court misadvised the defendant as to the nature of the charge. (R. T. I 3).

B. On the only occasion on which the Court inquired of the defendant as to his understanding of the nature of the charge, the Court had misadvised the defendant as to the nature of the charge, and had not corrected that mis-advice. (R. T. I 6).

United States v. Narvaez-Granillo, 119 F. Supp. 556, 560 (So. Dist. Cal. 1954) recognized that 8 U.S.C., Section 1324 requires different elements of proof for different subsections thereof.

The record of the proceedings on 19 September 1975, indicates, on its face,

that the accused, prior to stating that he understood the nature of the charge in response to the court's inquiry, was misinformed by the court that he was charged with "smuggling an alien". In fact, the defendant was not entering a plea of guilty to smuggling an alien, and further, the defendant was not charged in any count of the indictment with smuggling an alien. (C.T. 1-20).

2. The duty of the District Court, pursuant to Rule 11, Fed. R. Crim. P., which requires the Court to address the defendant personally in open court, and inform him of the nature of the charge to which the plea is offered, at the time the defendant's plea of guilty is entered, needs to be clarified.

Despite the facts set forth in paragraph 1. hereinabove, a distinguished panel of the Ninth Circuit has found adequate compliance with Rule 11, Fed. R.

Crim. P.

This Court has consistently held that the first and most universally recognized requirement of due process is real notice to the defendant of the true nature of the charge against him. Smith v. O'Grady, 312 U.S. 329, 334 (1940); Henderson v. Morgan, - U. S. -, 49 L. Ed. 2d 108, 114, decided June 17, 1976. This Court has also noted the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts. McCarthy v. United States, 394 U. S. 459, 463 (1968).

Recent cases decided in the United States Court of Appeals for the Third Circuit have concluded that Rule 11 requires the court to explain the meaning of the charge and what basic acts must be proved to establish guilt to the defendant.

"Recently this court has stated that in order to satisfy itself that the defendant actually does comprehend the charges

the court must explain the meaning of the charge and what basic acts must be proved to establish guilt." United States v. Cantor, 469 F. 2d 435, 438 (3d Cir. 1972), citing Woodward v. United States, 426 F. 2d 959, 962 (3d Cir. 1970).

"First, the court must satisfy itself that the defendant understands the nature of the charge. Routine questioning, or a single response by the defendant that he understands the charge, is insufficient. To satisfy itself that the defendant actually does comprehend the charges, the court must explain the meaning of the charge and what basic acts must be proved to establish guilt." United States v. Jasper, 481 Fed. 2d 976, 980 (3d Cir. 1973).

McCarthy v. United States, 394 U. S. 459 (1968) suggests that there are some cases in which personally addressing the defendant as to his understanding of the essential elements of the charge would seem to be required.

"20. The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any guidelines other than those expressed in the Rule itself. As our discussion of the facts in this particular case suggests, however, where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a

determination that he understands the meaning of the charge. In all such inquiries, "(m)atters of reality, and not mere ritual, should be controlling." Kennedy v. United States, 397 F. 2d 16, 17 (C. A. 6th Cir. 1968)." McCarthy v. United States, 394 U. S. 549, F. N. 20 at 467 (1968).

It seems clear that Rule 11 requires, at a minimum, that the court correctly inform the defendant of the nature of the charge to which the defendant is entering a plea. In the instant case, the court' inquired generally of the defendant, on one occasion only, whether he had a full and clear understanding of the nature of the charge. (R. T. 6). This inquiry followed shortly after the defendant was misinformed by the court as to the nature of the charge. (R.T. 3). At no time prior to inquiring of the defendant as to his understanding did the court correct its prior misadvice. It is submitted that misadvice by the court as to the nature of the charge to which defendant is entering a plea of guilty is as significant an instance of non-compliance with Rule 11 as

if the court had offered no advice at all.

It is apparent that there is a significant conflict between the Ninth Circuit and the Third Circuit concerning the duty of the District Court in complying with the mandate of Rule 11 which requires the Court to inform the defendant of the nature of the charge to which the plea is offered. This conflict requires resolution.

3. Petitioner's plea of guilty was involuntary in that petitioner at no time intended to waive his constitutional right to confront and cross-examine the witnesses against him.

The District Court, prior to accepting petitioner's plea of guilty, did advise petitioner of his right to be confronted by and cross-examine all witnesses who accused him, and of the fact that petitioner would give up this right by pleading guilty. (R. T. I 17-18).

Petitioner testified (supra, pp 13-14;

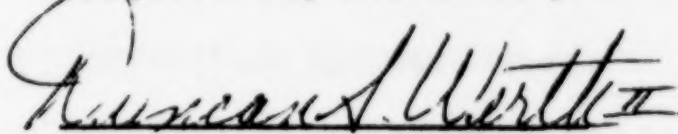
(C. R. 31-36; R. T. III 5) that he would not have plead guilty had he known his right to cross-examine the witnesses against him had not been exercised. His prior counsel had testified he thought the defendant misunderstood the word "cross-examination". (R. T. III 32). Under either situation it is clear that the witnesses were not cross-examined, and that petitioner, at the time his plea of guilty was entered, believed that his right to cross-examination had been previously exercised. Regardless of the "appearance" of voluntariness at the time of the entry of petitioner's plea of guilty, the record is clear that petitioner did not voluntarily waive his right to cross-examination, and therefore, did not voluntarily enter his plea of guilty.

CONCLUSION

For these reasons, the petitioner,

Robert Maxwell Fenlon, respectfully prays
that a writ of certiorari issue to review
the judgment of the United States Court
of Appeals for the Ninth Circuit in this
case.

Respectfully submitted,



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September 16, 1976

APPENDIX

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

~~As Berty~~ MAXWELL FENLON,
Defendant-Appellant.

No. 75-3734

ORDER
AFFIRMING

[June 7, 1976]

On Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and WALLACE, Circuit Judges, and
ANDERSON,* District Judge.

Judgment of conviction is affirmed.

v. and adequate compliance with Rule 11, Fed. R. Crim. P.

Further, we find no abuse of discretion in refusing to permit the
withdrawal of the plea of guilty.

~~DISTR~~ Honorable J. Blaine Anderson, United States District Judge for the
District of Idaho, sitting by designation.

APPENDIX B

FILED
Aug. 20 1976
Emil E. Melfi, Jr.
Clerk, U. S.
Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	} No. 75-3734 ORDER DENYING PETITION FOR REHEARING
Plaintiff-Appellee,)	
vs.)	
ROBERT MAXWELL FENLON,)	
Defendant-Appellant.)	

Before: CHAMBERS, WALLACE and ANDERSON,
Circuit Judges.

The petition for rehearing is
denied and the suggestion for a rehearing
in banc is rejected.

All active judges of the court have
been notified of the suggestion for a re-
hearing in banc and none has voted for a
rehearing in banc.